Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 78-53

WHIRLPOOL CORPORATION - - - Petitioner

versus

LEWIS SIMPSON - - - - - Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 78-53

WHIRLPOOL CORPORATION - - - - - *Petitioner*

v.

LEWIS SIMPSON - - - - - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Lewis Simpson, prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be denied for the reasons hereinafter set out.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit dated May 10, 1978, No. 76-2195, reversing the dismissal of Respondent's Complaint by the District Court for the Eastern District of Kentucky, is correctly reproduced as Appendix "A", page A 1, with Petition for Writ of Certiorari.

The Opinion cited by the Court of Appeals for the Sixth Circuit as authority for the disposition of this case of Gabriele v. Chrysler Corporation, is correctly reproduced as Appendix "C" with the Petition and is reported in 573 Federal Reporter 2nd 954.

The Opinion of the District Court for the Eastern District of Kentucky dismissing Respondent's Complaint is correctly reproduced as Appendix "B" with the Petition.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition for Writ of Certiorari.

QUESTIONS PRESENTED

I. Was the Court of Appeals for the Sixth Circuit correct in determining that prior resort to and exhaustion of State proceedings was not a jurisdictional prerequisite to filing suit in Federal District Court for violation of Federal Age Discrimination in Employment Act of 1967, 29 USC §§ 621-634, particularly § 633(b)?

II. Did Respondent's prior resort to the Secretary of Labor of the United States deprive state authorities of any jurisdiction under the Provisions of the Kentucky Revised Statutes Section 344.270?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are: 29 USC § 626(c) and 29 USC §§ 633(a) and 633(b) which provide:

> "(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter."
>
> "(a) Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action."
>
> "(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the

filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority."

and Kentucky Revised Statutes § 344.270 providing:

"Neither the Commission nor any court of this state shall take jurisdiction over any claim of an unlawful practice under this chapter while a claim of the same person seeking relief for the same grievance is pending. A final determination of a claim alleged in an unlawful practice under this chapter shall exclude any other action or proceeding brought by the same person based on the same grievance."

STATEMENT OF THE CASE

Respondent, Lewis Simpson, after more than twenty-five years of employment by Petitioner, Whirlpool Corporation, in positions of great responsibility and after numerous commendations for outstanding performance, was threatened with termination of his employment at the end of six months unless within that time he complied with certain nebulous, confusing and uncertain recommendations of a new and younger supervisor, determined to rid the company of older employees. To avoid a forfeiture of his employee benefits and preserve whatever rights would accrue as an employee in good standing upon his resignation, Simpson tendered his resignation and notified the United

States Secretary of Labor of the violation of his rights under the Age Discrimination in Employment Act of 1967 (ADEA). Together with his counsel he attended a conciliation conference conducted by a representative of the United States Department of Labor at which agreement was determined to be impossible and from there went to the office of the Director of Labor Standards of the Kentucky Department of Labor at Frankfort, Kentucky, to learn where and in what form a complaint should be made to state authorities of the age discrimination which Petitioner had practiced upon him.

The Kentucky Director of Labor Standards advised Respondent such complaints were handled at the Louisville, Kentucky, office and suggested that he, the director, would call that office and allow Respondent to discuss his problem with that office, which he did. No record of that call was preserved but the evidence of the director confirmed the call by Petitioner.

The following day Petitioner's counsel was notified by the Louisville, Kentucky, office of the Kentucky Department of Labor that since Petitioner had elected to complain to Federal authorities and desired to file suit in Federal District Court he was free to do so. No record of this call was kept, but the testimony of the Executive Director of the Kentucky Commission on Human Rights and of his first assistant confirmed that at that time it was routine for the Department to so advise those contemplating federal action.

Suit was timely filed by Respondent in Federal District Court for the Eastern District of Kentucky.

Upon Petitioner's Motion to Dismiss for failure to file a written complaint with state authorities before commencing federal action the District Judge felt compelled to sustain Petitioner's Motion under the authority of Goger v. H. K. Porter, 492 F. 2d 13 (3rd Cir. 1974) as set forth in his Opinion (Appendix B of Petition).

Upon appeal to the United States Court of Appeals for the Sixth Circuit that Court reversed the Judgment of the District Court and remanded the case for further proceedings consistent with its Opinion in Gabriele v. Chrysler Corporation, 573 F. 2d 954. Petitioner seeks relief from that Order in this Petition for Writ of Certiorari.

ARGUMENT

I. Was the Court of Appeals for the Sixth Circuit Correct in Determining That Prior Resort to and Exhaustion of State Proceedings Was Not a Jurisdictional Prerequisite to Filing Suit in Federal District Court for Violation of Federal Age Discrimination in Employment Act of 1967, 29 USC §§ 621-634, Particularly § 633 (b)?

(A) First let it be pointed out that the cases of Goger v. H. K. Porter, 492 F. 2d 13 (3rd Cir. 1974) and Evans v. Oscar Mayer & Co., 17 FEP (8th Cir.) upon which Petitioner so heavily relies, are no longer authorities for Petitioner's position. Goger has been repudiated by the United States Court of Appeals for the Third Circuit, the Court which decided the case, in an unreported opinion in the case of James R. Holliday

v. Ketchum, MacLeod & Grove, Inc., et al., decided July 14, 1978, and reproduced herewith as Appendix "B".

The opinion in Evans v. Oscar Mayer & Company cited on page 6 of the Petition was withdrawn by the Court of Appeals for the Eighth Circuit and the opposite conclusion reached in an opinion yet unpublished which is reproduced herewith marked Appendix "B".

(B) It would be presumptuous of this writer to assume that improvement could be made on the reasoning of the Courts of Appeals for the Third, Sixth and Eighth Circuits as set out in Gabriele, Holliday and Evans, *supra,* as well as the opinion of the District Court in Vasquez v. Eastern Air Lines, 405 F. Supp. 1353 (D. C. Puerto Rico, 1975). Further attempt to justify the Order of the Court of Appeals for the Sixth Circuit reversing the dismissal of Respondent's suit in this case would be an imposition upon this Court and no further attempt to do so will be made here.

II. Did Respondent's Prior Resort to the Secretary of Labor of the United States Deprive State Authorities of Any Jurisdiction Under the Provisions of the Kentucky Revised Statutes Section 344.270?

(A) The provisions of KRS 344.270 depriving the state of all jurisdiction in matters involving age discrimination while such a claim is pending by the same person. Whether it is unique or not, other cases do not deal with the provision or its effect upon an injured party's right to seek relief under Federal law. It is submitted that, upon being informed by Respondent

that he had made a complaint to the United States Department of Labor, the officials of the State Labor Department gave the only answer they could give under the provisions of this Statute and that was that Petitioner was free to proceed with an action in Federal Court.

(B) It is true that this question was never reached or decided in the Circuit Court of Appeals. However, it is submitted that had the Circuit Court reached a different conclusion with regard to the requirement of a resort to state authority before bringing action in Federal Court, it would probably have reversed the District Court in this case because of the foregoing provision of the Kentucky Statutes and the resulting conflict with the Federal Act.

Further, we believe it to be impossible to reconcile this provision of the Kentucky Statutes with the provisions of § 633(a) that commencement of an action under the act shall supersede any state action. The simple truth is that any construction other than that adopted by the Court of Appeals in this and the Gabriele case would involve an exercise in futility of resorting to some type of complaint to state authority with no requirement to bring it to any conclusion since filing a federal action would supersede it any way.

(C) Finally, an examination of the Kentucky Age Discrimination Statute will show that its provisions fall far short of the provisions of the federal act insofar as protecting an injured employee. There are only injunctions and small fines provided for the offending

employee and the right to resort to state courts for redress of grievances.

There is a serious question which could be raised as to whether the Kentucky Age Discrimination Law complies at all with the § 633(b) as a State having

> "* * * a law prohibiting discrimination in employment because of age and establishing or authorizing a state authority to grant or seek relief from such discriminatory practice. * * *"

Because it is not the basis of the ruling of the Court of Appeals for the Sixth Circuit and is of relatively minor importance by comparison to the real reason for the ruling of the Court in this case further discussion of this issue will not be undertaken. Nevertheless, it is present and should be discussed further in the event the Court does not agree with the Court of Appeals on the basis of its opinion herein.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 77-1692

JOSEPH W. EVANS, - - - - - - - - Appellee,

v.

OSCAR MAYER & Co.,
ROBERT M. BOLZ,
N. D. OTTENS,
DONALD L. PAUL, and
PAUL F. GOULD, - - - - - - - - *Appellants.*

Appeal from the United States District Court for the Southern District of Iowa.

OPINION ON REHEARING

Before BRIGHT and HENLEY, Circuit Judges, and TALBOT SMITH, Senior District Judge.*

HENLEY, Circuit Judge.

Joseph W. Evans brought this suit against his employer, Oscar Mayer & Co., and its executives,[1] charging that they had forced him into early retirement in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C.

---

*TALBOT SMITH, United States Senior District Judge, Eastern District of Michigan, sitting by designation.

[1]In this opinion we shall refer to the defendants collectively as "Oscar Mayer."

§§ 621-634 (1970). Oscar Mayer moved to dismiss the action for want of jurisdiction. The district court denied the motion and certified this interlocutory ruling for appeal under 28 U.S.C. § 1292(b) (1970), stating that the order presented a "controlling question of law as to which there is substantial ground for difference of opinion" and "that an immediate appeal . . . may materially advance the ultimate outcome of the litigation." This court thereafter permitted this appeal.

The case was argued and submitted on January 12, 1978, and was decided on April 5 of this year. A majority of the court voted to vacate the order of the district court and to remand the case for further proceedings. Thereafter, the plaintiff-appellee filed a petition for rehearing and suggestions for rehearing en banc. Plaintiff was supported in his position by the Secretary of Labor who is charged with the duty of enforcing ADEA but who was not a party to the original action. The Secretary was permitted to file an amicus curiae brief taking the position that the district court had jurisdiction of the case, and that the original determination of the district court was correct.

In his brief the Secretary pointed out that two days after our original decision was announced, the Court of Appeals for the Sixth Circuit had reached an opposite result in *Gabriele* v. *Chrysler Corp.*, ____ F. 2d ____ (6th Cir. No. 76-2265 April 7, 1978), and that that court had adhered to *Gabriele* in an order entered on April 10, 1978 in *Simpson* v. *Whirlpool Corp.*, ____ F. 2d ____ (6th Cir. No. 76-2195 April 10, 1978).

We have given careful consideration to the matter. We grant rehearing, withdraw our original opinion and substitute this one in its stead. This time, we affirm the order of the district court.

Joseph Evans worked for Oscar Mayer & Co. in Davenport, Iowa for twenty-three years before his retirement on January 31, 1976. On March 10, 1976 Evans notified the

Secretary of Labor, as required by 29 U.S.C. § 626(d),[2] that he intended to sue Oscar Mayer under the ADEA. He filed the present action in federal district court on May 7, 1977. Thereafter Oscar Mayer moved to dismiss the action for lack of subject matter jurisdiction, arguing that Evans had not fulfilled a jurisdictional requirement under 29 U.S.C. § 633(b) because he did not first file charges with the Iowa Civil Rights Commission. The district court concluded that filing charges with an appropriate state agency is not a jurisdictional prerequisite to an action in federal court. It therefore denied the motion, and Oscar Mayer appealed.

Section 633(b) of the ADEA reads as follows:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, *no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law,* unless such proceedings have been earlier terminated: *Provided,* That such sixty-day period shall

---

[2]Section 626(d) provides:

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority. [Emphasis added.]

Iowa has a law prohibiting age discrimination in employment,[3] and the Iowa Civil Rights Commission has the authority to seek relief from such practices. The narrow issue raised on appeal is whether filing a claim with the State Agency is a prerequisite to a suit under the ADEA.

A definitive answer cannot be found in either the language of the statute, its legislative history, or the policy behind it. The extensive discussions found in *Vazquez* v. *Eastern Air Lines, Inc.*, 405 F. Supp. 1353 (D. P.R. 1975) (filing with state agency not required), and *Bertsch* v. *Ford Motor Co.*, 415 F. Supp. 619 (E.D. Mich. 1976) (filing with state agency is required), demonstrate that substantial support can be found for either conclusion. Several courts have determined that deference to an appropriate state agency is required by the ADEA, *see Reich* v. *Dow Badische Co.*, ___ F. 2d ___, 17 FEP Cases 363 (2d Cir. No. 76-7637, April 4, 1978), including the dissenting opinion of Judge Feinberg; *Curry* v. *Continental Airlines*, 513 F. 2d 691 (9th Cir. 1975); *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13 (3d Cir. 1974); *Gabriele* v. *Chrysler Corp.*, 416 F. Supp. 666 (E.D. Mich. 1976), *rev'd*, ___ F. 2d ___ (6th Cir. 1978), *supra*; *Fitzgerald* v. *New England Telephone & Telegraph Co.*, 416 F. Supp. 617 (D. Mass. 1976), *modified*, 437 F. Supp. 633 (1977); *Berry* v. *Crocker Nat'l Bank*, 13 FEP

[3] Iowa Code Ann. § 601A.6 (1975).

Cases 673 (N.D. Cal. 1976), while other courts have held it to be optional, *see Bertrand* v. *Orkin Exterminating Co.*, 419 F. Supp. 1123 (N.D. Ill. 1976); *Smith* v. *Jos. Schlitz Brewing Co.*, 419 F. Supp. 770 (D. N.J. 1976); *Magalotti* v. *Ford Motor Co.*, 418 F. Supp. 430 (E.D. Mich. 1976); *Skoglund* v. *Singer Co.*, 403 F. Supp. 797 (D. N.H. 1975).

While it is obvious that the authorities are in conflict, and the question is not free from doubt, we think that the preferable view is that taken by the Court of Appeals for the Sixth Circuit in *Gabriele, supra*, and which is also expressed in the concurring opinion of Judge Garth in *Goger* v. *H. K. Porter Co., supra*, 492 F. 2d at 17-18. We now hold that if an individual complaining about alleged discrimination against him in employment on account of his age in fact files a complaint with a state fair employment practice agency like the Iowa Civil Rights Commission, he must observe the waiting period prescribed by § 633(b). We do not think, however, that an individual is required to file a complaint with the state agency before coming into federal court, assuming that he complies with the basic waiting period prescribed by § 626(d). In our opinion such an individual has the option of proceeding first before the state agency and then in the federal court or of proceeding initially in the federal court without prior resort to the state agency.

The views here expressed are in accord with the interpretation that the Secretary places on § 633(b), and it goes without saying that his interpretation of the Act is entitled to great weight. *See, e.g., Van Wyk* v. *Bergland, Secretary of Agriculture*, 570 F. 2d 701, 704 (8th Cir. 1978), and cases cited.

Affirmed.

BRIGHT, Circuit Judge, dissenting.

I respectfully dissent.

In my judgment, in a state such as Iowa, which has laws prohibiting age discrimination and an agency with author-

ity to seek relief from such practice, filing a charge with the state agency is mandatory under the ADEA and is a prerequisite to the filing of an action in federal court, subject, however, to certain equitable consideration. *See Reich* v. *Dow Badische Co.*, 17 FEP Cases 363, 368 (2d Cir. 1978); *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13, 16 (3d Cir. 1974).

Congress clearly intended that discrimination on the basis of age be remedied as quickly and efficiently as possible, for lengthy delays in the courts and administrative agencies could deprive older workers of an effective remedy. Section 626(d) of the ADEA expressly requires the claimant to notify the Secretary of Labor before filing suit and requires the Secretary to "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." Although Congress patterned much of the ADEA after Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1970), and other labor statutes, it rejected a proposed enforcement procedure that would have subjected ADEA complaints to the same delays that plague the EEOC and NLRB. *Vazquez* v. *Eastern Air Lines, Inc., supra,* 405 F. Supp. at 1354-55. Instead, the claimant need defer to the Secretary of Labor and the state agency for only sixty days before bringing suit. Thus, in those cases in which the Secretary of Labor or the state agency is able to provide speedy relief, the claimant can escape the delay inherent in any federal court action. On the other hand, if prompt relief cannot be obtained, the claimant may bring an action after waiting only sixty days. Requiring a claimant to seek relief through a state agency designed specifically to handle this type of case is consistent with congressional intent. It increase the chances of conciliation while creating no additional delay, for the sixty-day period of deference to the state agency may run concurrently with the sixty-day period of deference to the

Secretary of Labor. *Bertsch* v. *Ford Motor Co., supra,* 415 F. Supp. at 623.

Moreover, the pertinent language of section 633(b) is nearly identical to language in Title VII:

> In the case of an alleged unlawful employment practice occurring in a State * * * which has a * * * law prohibiting the unlawful employment practice alleged and establishing or authorizing a State * * * authority to grant or seek relief from such practice * * *, no charge may be filed * * * by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State * * * law, unless such proceedings have been earlier terminated * * *. [42 U.S.C. § 2000e-5(b) (1970) (currently at § 2000e-5(c)).]

This language of Title VII requires that state agencies be afforded an opportunity to consider the employment discrimination before suit for redress may be brought in a federal court. *See Love* v. *Pullman Co.*, 404 U. S. 522 (1972); *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228 (8th Cir. 1975).

In the present cases, however, I would not dismiss the action outright, even though Evans failed to file a charge with the state agency. That requirement is not "jurisdictional"; it is a procedural requirement, which may be subject to equitable modification when necessary to effect the broad remedial purposes of the statute. A similar principle has been applied in interpreting various procedural requirements under Title VII, *see Lacy* v. *Chrysler Corp.*, 533 F. 2d 353 (8th Cir.), *cert. denied,* 429 U. S. 959 (1976); *Tuft* v. *McDonnell Douglas Corp.*, 517 F. 2d 1301 (8th Cir. 1975), *cert. denied,* 423 U. S. 1052 (1976); *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924 (5th Cir. 1975); *Franks* v. *Bowman Transportation Co.*, 495 F. 2d 398 (5th

Cir. 1974), *rev'd on other grounds,* 424 U. S. 747 (1976), and I feel it should apply to the present case.

In his resistance to Oscar Mayer's motion to dismiss, Evans argued that he had relied on official advice from the Department of Labor that the only requirement under the ADEA was notice to the Secretary of Labor. Moreover, Evans had no interpretation of section 633(b) by this court to guide him. *See Goger* v. *H. K. Porter Co.,* 492 F. 2d 13, 16-17 (3d Cir. 1974). The district court did not reach this question in disposing of Oscar Mayer's motion. I would, therefore, vacate the district court's order and remand for further proceedings on the motion to dismiss.

July 6, 1978

A true copy.
Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1867

JAMES R. HOLLIDAY,
Appellant

v.

KETCHUM, MACLEOD & GROVE, INC., a corporation; EDWARD T. PARRACK; WILLIAM H. GENGE; CHARLES E. McHUGH; and JAMES E. FULLER

(D.C. Civil No. 77-140)

Appeal from the United States District Court for the Western District of Pennsylvania

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Argued February 24, 1978

BEFORE: ADAMS and HIGGINBOTHAM, *Circuit Judges,* and BECHTLE* *District Judge*

Reargued May 11, 1978 In Banc

BEFORE: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, and HIGGINBOTHAM, *Circuit Judges*

OPINION OF THE COURT
(Filed July 14, 1978)

---

*Honorable Louis C. Bechtle, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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GARTH, *Circuit Judge.*

The question before us today is the very same question which a panel of this court answered in 1974: must a private plaintiff who charges employment discrimination in violation of the federal Age Discrimination in Employment Act of 1967 (ADEA)[1] be required to utilize state remedies before filing a suit in federal court? In 1974, a majority opinion of a panel of this court answered that question in the affirmative, holding that initial resort to state remedies was required. *Goger* v. *H. K. Porter Co.,*

[1]Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified *as amended* at 29 U.S.C. §§ 621 *et seq.*)).

Inc., 492 F. 2d 13 (3d Cir. 1974).[2] Today, having reconsidered this issue, we have arrived at a different answer. Thus we overrule *Goger*[3] and hold that resort to state age discrimination remedies is not a precondition to maintaining a federal suit for age discrimination.

I

On April 15, 1957, James R. Holliday entered into employment with Ketchum, MacLeod & Grove, Inc. (Ketchum), an advertising agency. Holliday served in the position of production manager at Ketchum for some nineteen years, until January 30, 1976. On that date, Holliday, age 57, was terminated. Ketchum contends that Holliday was "involuntarily retired" "pursuant to the early retirement provisions of Ketchum's pension plan."[4] Holliday claims that Ketchum illegally discriminated against him because of his age, and that as a result he has suffered injury.[5]

[2]The majority opinion in *Goger,* although holding that initial state resort was essential, nevertheless permitted Goger's federal action to proceed on the basis of equitable considerations. The *Goger* concurrence, while disagreeing with the majority opinion's statutory analysis, reached the same result, and concluded as we do today that the ADEA permits, but does not require, initial resort to state remedies. 492 F. 2d at 17-18.

[3]The Internal Operating Procedures of this circuit provide that an in banc court is permitted to overrule a previous panel decision of this court. IOP § M. 2 (1974).

[4]Appellee's Brief at 4-5. *See* United Air Lines, Inc. v. McMann, 46 U.S.L.W. 4043, 4046 (U.S. Dec. 12, 1977) ("we find nothing to indicate Congress intended wholesale invalidation of retirement plans instituted in good faith before [the ADEA's] passage"), *superseded by* Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978) (codified at 29 U.S.C.A. § 623(f)(2) (Supp. 1 June, 1978)) ("no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual").

[5]Complaint ¶¶ 12-17. *See* 29 U.S.C.A. § 623(f)(2) (Supp. 1 June, 1978), *quoted* n. 4 *supra;* H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 8, *reprinted in* [1978] U.S. Code Cong. & Ad. News 1000, 1001 (retirement plans in effect before the enactment of the ADEA are *not* exempt from § 623(f)(2)).

Holliday initially sought redress by filing a notice under the ADEA with the Secretary of Labor (Secretary).[6] Holliday filed his notice on July 15, 1976—one hundred sixty-eight (168) days following his discharge—thereby complying with the ADEA's one hundred eighty (180) day limitations period for notifying the Secretary of age discrimination complaints.[7] Holliday however did not file an age discrimination claim with the Pennsylvania Human Relations Commission (Commission)[8] until August 5, 1976—one hundred eight-nine (189) days following his discharge. The Commission dismissed Holliday's complaint as untimely, because discrimination complaints must be filed with the Commission "within ninety days after the alleged act of discrimination."[9]

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[6]29 U.S.C. § 626(d) (prior to 1978 amendment) provided in relevant part:

> No civil action may be commenced by any individual . . . until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred . . . .

Section 626(d), *as amended*, Pub. L. No. 95-256, § 4(b)(1), 92 Stat. 190, 191 (1978) (reproduced at 46 U.S.L.W. 51 (May 9, 1978)) requires that a litigant file a "charge" rather than a "notice of intent" with the Secretary.

[7]*See* n. 6 *supra*.

[8]The Pennsylvania Human Relations Act, Pa. Stat. Ann. tit. 43, §§ 951 *et seq.* (Purdon 1964 & Supp. 1978), prohibits among other things age discrimination in employment against those between the ages of forty and sixty-two. *Id.* §§ 952, 953, 954(h), 955. The statute establishes the Pennsylvania Human Relations Commission as the agency which has the power *inter alia* "[t]o adopt, promulgate, amend and rescind rules and regulations to effectuate the policies and provisions of this act," *id.* § 957(d); "[t]o initiate, receive, investigate and pass upon complaints charging unlawful discriminatory practices," *id.* § 957(f); "[t]o hold hearings, subpoena witnesses," *id.* § 957(g); and "[t]o prepare and distribute fair practices notices," *id.* § 957(*l*).

[9]*Id.* § 959, ¶ 7 (Purdon Supp. 1977).

In view of our disposition, we need not reach Holliday's contention that he satisfied the ADEA's state resort requirement by

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In light of the Commission's dismissal of Holliday's claim, the district court granted Ketchum's motion to dismiss Holliday's federal complaint. The district court reasoned that under *Goger* and its progeny, "by failing to timely file with the [Commission] the Plaintiff has not afforded the state agency a reasonable opportunity to resolve the matter . . . and his [federal] suit is jurisdictionally defective."[10]

Holliday appealed.

II

Section 623(a) of Title 29, United States Code, provides that:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age;* . . . (Emphasis added).[11]

A complainant seeking to invoke the protective provisions of the ADEA must, as noted, comply with certain

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filing a state age discrimination claim 189 days following the challenged act. *Cf.* Bonham v. Dresser Indus., Inc., 569 F. 2d 187 (3d Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3695 (U.S. May 1, 1978) (No. 77-1562) (untimely state filing will not preclude federal suit if state age discrimination claim filed within 180 days).

[10]Holliday v. Ketchum, MacLeod & Grove, Inc., Civ. Action No. 77-140, Memorandum Op. at 2 (W.D. Pa. May 6, 1977); *Id.*, Order dated May 6, 1977.

[11]Discussions of age discrimination and of the ADEA are furnished in Note, *The Age Discrimination in Employment Act of 1967*, 90 Harv. L. Rev. 380 (1976); Note, *Age Discrimination in Employment*, 50 N.Y.U.L. Rev. 924, 945-51 (1975). The 1978 amendments to the ADEA are highlighted in Explanatory Notes, 46 U.S.L.W. 53-57 (May 9, 1978).

time limits for filing a notice with the Secretary.[12] In addition, the relevant portion of section 14(b) of the ADEA, 29 U.S.C. § 633(b), provides as follows:

> Federal-State relationship
>
> . . .
>
> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title [*quoted in part in* n.6 *supra*] before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. . . .

As we stated at the outset of this opinion, the issue decided four years ago in *Goger*, and reconsidered today, is whether section 633(b) requires, or merely permits, a plaintiff to resort to available state age discrimination remedies before instituting federal suit. The resolution of that issue depends upon the interpretation of two statutory provisions: section 626(d), *quoted in part in* n.6 *supra*, and section 633, *quoted in part in* text above.

When *Goger* was decided, the majority of the *Goger* panel, relying primarily on the near-identity of language of section 633(b) and a comparable provision found in Title VII of the Civil Rights Act of 1964[13] reasoned that:

[12] *See* n. 6 *supra*.

[13] 42 U.S.C. § 2000e-5(c), *amending* 42 U.S.C. § 2000e-5(b), reads as follows:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or

(Footnote continued on following page)

> The minor differences between section 633 and its counterpart under the 1964 Act [Title VII] are insignificant and provide no support for an interpretation of the former which is contrary to the Supreme Court's construction in Love v. Pullman, [404 U. S. 522 (1972) (requiring resort to state remedies)]. . . . We therefore conclude that section 633(b) *required* appellant to seek relief from the appropriate [state] agency prior to instituting her suit in the federal district court.

492 F. 2d at 16 (emphasis added).[14]

Relying on a different statutory analysis, the concurrence concluded that section 633(b) afforded litigants an initial choice of forum. 492 F. 2d at 17-18.

The proper interpretation of Section 633(b), requiring as it does the harmonization of admittedly mixed statutory signals, has understandably given rise to a multitude of cases[15] and, inevitably, to differences in result. Those courts which followed our *Goger* decision have in large part adopted the majority's analysis and, by analogizing section 633(b) to the purportedly comparable provision in Title

(Footnote continued from preceding page)

> to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated. . . .

The Supreme Court has construed this provision in Title VII to require a prior resort to state remedies. Love v. Pullman Co., 404 U. S. 522 (1972).

[14] *Accord*, Bonham v. Dresser Indus., Inc., 569 F. 2d 187 (3d Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3695 (U.S. May 1, 1978) (No. 77-1562); Rogers v. Exxon Research & Engineering Co., 550 F. 2d 834 (3d Cir. 1977), *cert. denied*, 98 S. Ct. 749 (1978).

[15] There have been at least forty-three reported judicial decisions which interpret the language of section 633(b). Explanatory Notes to the 1978 Amendments, 46 U.S.L.W. at 56.

VII (42 U.S.C. § 2000e-5(c)), have required resort to state age discrimination remedies before federal suit may be instituted.[16]

Other courts[17] and jurists,[18] the administrative agency charged with enforcement of the ADEA,[19] a joint congressional committee,[20] and certain commentators[21] have cited the *Goger* concurrence and have agreed with the analysis in that opinion that section 633(b) of the ADEA affords the plaintiff an initial choice of forum.

Recognizing the conflict that existed among the various statutory interpretations[22] and faced with increased in-

[16] *E.g.*, Evans v. Oscar Mayer & Co., No. 77-1692 (8th Cir. Apr. 5, 1978); Reich v. Dow Badishe Co., No. 76-7637, slip op. at 6657-70 (2d Cir. Apr. 4, 1978); Curry v. Continental Airlines, 513 F. 2d 691, 693 (9th Cir. 1975); *cf.* Hadfield v. Mitre Corp., 562 F. 2d 84 (1st Cir. 1977) (assuming the applicability of the state resort requirement but refusing to confront the issue directly).

[17] *E.g.*, Gabriele v. Chrysler Corp., 573 F. 2d 949 (6th Cir. 1978); Simpson v. Whirlpool Corp., 573 F. 2d 957 (6th Cir. 1978) (mem.) (following *Gabriele*); Vazquez v. Eastern Air Lines, Inc., 405 F. Supp. 1353 (D.P.R. 1975); *cf.* Bertrand v. Orkin Exterminating Co., Inc., 419 F. Supp. 1123 (N.D. Ill. 1976), *reaffirmed*, 432 F. Supp. 952 (N.D. Ill. 1977).

[18] Reich v. Dow Badiche Co., No. 76-7637, slip op. at 6678 (2d Cir. Apr. 4, 1978) (Feinberg, J., dissenting); Evans v. Oscar Mayer & Co., No. 77-1692, slip op. at 7 (8th Cir. Apr. 5, 1978) (Henley, J., dissenting).

[19] In this case, as in many others, the Secretary of Labor filed an *amicus curiae* brief. The Secretary has consistently argued that the ADEA affords the claimant a choice of forum.

[20] *See* pp. 13-15 *infra*.

[21] *E.g.*, Note, *Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act*, 44 U. Chi. L. Rev. 457, 475-80 (1977) (hereinafter Note, *Procedural Prerequisites*). *See also* Note, *The Age Discrimination in Employment Act of 1967*, 90 Harv. L. Rev. 380, 411 (1976) ("While the language of the ADEA may be identical to that of Title VII in most respects, the problems of age, race and sex discrimination are not. As a result, in resolving these questions under the ADEA, courts could do well to avoid automatic application of Title VII precedents and to look instead more carefully to the distinctive aspects of age discrimination.").

[22] In Bertrand v. Orkin Exterminating Co., Inc., 419 F. Supp. 1123 (N.D. Ill. 1976), *reaffirmed*, 432 F. Supp. 952 (N.D. Ill.

(Footnote continued on following page)

stances of claimants who had not resorted to state remedies, or had done so in an untimely fashion, and further aware of the policy considerations which inclined toward the complainant's choice of forum,[23] we deemed it appropriate to once more examine the issue decided in *Goger*, and insofar as this circuit is concerned, to resolve it definitively by *in banc* decision. In arriving at our determination to reexamine, and ultimately to overrule, *Goger*, we were aided by the Supreme Court's discussion in *Lorillard* v. *Pons*, 46 U.S.L.W. 4150 (U.S. Feb. 22, 1978), and by the recent statutory amendments to the ADEA which, although not controlling, buttress our conclusion that resort need not be had to state administrative machinery prior to filing a federal action.

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1977), Judge Decker summarized some of the conflicting views concerning the proper construction of § 633(b).

> At one extreme may be found a case such as *Vaughn* v. *Chrysler Corporation*, 382 F. Supp. 143 (E.D. Mich. 1974), which analogizes § 633(b) to the jurisdictional deference provisions of Title VII, 42 U.S.C. § 2000e-5(c), thereby constituting a bar to plaintiff's cause of action. Somewhat less harsh is the conclusion of the majority in *Goger* v. *H. K. Porter Co., Inc.*, 492 F. 2d 13 (3d Cir. 1974), that while § 633(b) is a jurisdictional requirement, it nonetheless will not compel dismissal of an action where a plaintiff can present an equitable claim justifying the hearing of his cause. *Curry* v. *Continental Airlines*, 513 F. 2d 691 (9th Cir. 1975), also utilized the analogy of Title VII law to find jurisdictional import in § 633(b), but it strictly construed the words of that section to require a specific legislative mandate to the state authority concerning age-discrimination.
>
> At the other extreme is the more recent opinion in *Vazquez* v. *Eastern Airlines, Inc.*, 405 F. Supp. 1353 (D.P.R. 1975), which concluded that § 633(b) did not establish resort to state law as a jurisdictional prerequisite for a federal age discrimination action. This opinion closely relies on the concurring opinion of Judge Garth in *Goger, supra*. . . .

Id. at 1125.

[23] *See* pp. 16-17 *infra*.

While the narrow holding of *Lorillard* (that claimants under the ADEA are entitled to a jury trial)[24] is not relevant to our present determination, we find highly relevant the discussion in *Lorillard* which concerns the proper interpretation of the entire ADEA. There a unanimous Court[25] ruled that "but for" specific exceptions contained in the ADEA, Congress "intended to incorporate fully [into the ADEA] the remedies and procedures of the [Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*]". 46 U.S.L.W. at 4151. The Court explicitly *rejected* the relevance of Title VII procedures to lawsuits which allege age discrimination. In this connection, albeit in the context of entitlement to a jury trial, the Supreme Court stated:

> [T]he rights created by the ADEA are to be "enforced in accordance with the powers, remedies and procedures" of specified sections of the FLSA. 29 U.S.C. § 626(b).
>
> . . .
>
> Petitioner strives to find a contrary congressional intent by comparing the ADEA with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which petitioner maintains does not provide for jury trials. We, of course, intimate no view as to whether a jury trial is available under Title VII as a matter of either statutory or constitutional right. [Citation.]

[24] *Accord*, Rogers v. Exxon Research & Engineering Co., 550 F. 2d 834, 838-40 (3d Cir. 1977), *cert. denied*, 98 S. Ct. 749 (1978). Congress recently codified the Supreme Court's holding in *Lorillard* that a jury trial is required under the ADEA, *see* Pub. L. No. 95-256, § 4(a), 92 Stat. 190 (1978) (codified at 29 U.S.C.A. § 626(c)(2) (Supp. 1 June, 1978)) (reproduced at 46 U.S.L.W. 51 (May 9, 1978)), thereby signifying congressional approval of that decision.

[25] Justice Blackmun did not participate in the decision.

> However, after examining the provisions of Title VII, we find petitioner's argument by analogy to Title VII unavailing. There are important similarities between the two statutes, to be sure, both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII. But in deciding whether a statutory right to jury trial exists, *it is the remedial and procedural provisions of the two laws that are crucial and there we find significant differences.*
>
> . . .
>
> [*R*]*ather than adopting the procedures of Title VII for ADEA actions, Congress rejected that course in favor of incorporating the FLSA procedures* even while adopting Title VII's substantive prohibitions. Thus, *even if petitioner is correct that Congress did not intend there to be jury trials under Title VII, that fact sheds no light on congressional intent under the ADEA. Petitioner's reliance on Title VII, therefore, is misplaced.*

46 U.S.L.W. at 4151-52 (footnotes omitted) (emphasis added).

As we have previously noted, the majority opinion in *Goger* reached its conclusion through an almost exclusive reliance on an analogy between procedures prescribed under Title VII and those applicable under the ADEA. We now know however that such reliance was unwarranted. Rather, procedures are to be imported from the FLSA, a statute which does not require any, let alone prior, resort to state proceedings in order to redress FLSA violations. 29 U.S.C. §§ 216, 217. The critical premise supporting the majority opinion's reasoning in *Goger* having been undercut by the

Supreme Court's interpretation of the ADEA,[26] the *Goger* conclusion that prior state resort is necessary must also fall.[27]

In sum, *Lorillard* compels us to disavow the *Goger* majority's reliance on an analogy to Title VII procedure—a reliance which it now appears was "misplaced." 46 U.S.L.W. at 4152. We therefore start our inquiry afresh, by examining the language and history of the ADEA in light of comparable provisions found in the FLSA.[28]

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[26] *Accord,* Reich v. Dow Badiche Co., No. 76-7637, slip op. at 6670, 6675 (2d Cir. Apr. 4, 1978) (concurring opinion), where Judge Danaher stated:

> We fairly may disregard Title VII cases respecting the point here at issue under ADEA [whether §§ 626(a) and 633(b) require state resort] in view of the Court's opinion in *Lorillard* v. *Pons,* ____ U. S. ____, ____, 46 U.S.L.W. 4150, 4152 (U.S. February 22, 1978), where the Court perceived that Congress specifically had refused to adopt the procedures of Title VII for ADEA actions. Definitely, the Court made clear, the Congress in ADEA private actions had incorporated fully the remedies and the procedures of the Federal Labor Standards Act.

Cf. Carter v. Marshall, 46 U.S.L.W. 2595 (D.D.C. Apr. 20, 1978) (relying in part on reasoning contained in *Lorillard,* district court held that federal employees have right to jury trial under Equal Pay Act).

[27] *But cf.* Reich v. Dow Badiche Co., No. 76-7637, slip op. at 6670 (2d Cir. Apr. 4, 1978) (Danaher, J., concurring) (concluding that ADEA requires prior state resort but disavowing analogy to Title VII procedures).

While the *Goger* holding could possibly be sustained on some ground other than a Title VII—ADEA comparison and analysis, we have have found no such ground to be persuasive. *See* Reich v. Dow Badiche Co., No. 76-7637, slip op. at 6678 (Feinberg, J., dissenting); text p. 16 *infra.*

[28] As Justice Powell so recently stated, a court must decide "'not to reject [wisdom] merely because it comes too late.'" Monell v. Department of Social Services, 46 U.S.L.W. 4569, 4582 (U.S. June 6, 1978) (concurring opinion) (brackets in original), *quoting* Henslee v. Union Planters Bank, 335 U. S. 595, 600 (1949) (Frankfurter, J., dissenting).

III

The language of the ADEA itself strongly supports our conclusion that no initial resort to state age discrimination remedies is required. The statute nowhere explicitly imposes a resort to state proceedings as a precondition to instituting federal suit. The provision most likely to have dealt with this subject—the jurisdictional provision—does not even suggest, let alone require, prior utilization of available state machinery. 29 U.S.C. §§ 626(c), (d), *as amended,* 29 U.S.C.A. §§ 626 (c), (d) (Supp. 1 June, 1978). Similarly, the FLSA does not require nor intimate that prior resort to state administrative machinery is necessary to enforce its provisions. *Id.* §§ 216, 217. Indeed, the FLSA prescribes precisely the opposite procedure: a complainant is afforded a choice of forum to enforce the provisions of the statute. *Id.* § 216(b).

Nor can the ADEA be construed as even impliedly requiring resort to state remedies. Here 29 U.S.C. § 633 is relevant. The sole basis for suggesting a state resort requirement, *i.e.,* that the language of 633(b) apparently tracks the state exhaustion provision found in Title VII, has been destroyed by *Lorillard.*[29] By contrast, three argu-

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[29] *Lorillard* aside, the relevance of the Title VII exhaustion requirement to enforcement procedures under the ADEA was suspect from the outset.

> Most courts that have read § 2000e-5(c) as requiring such prior resort have done so because Title VII's legislative history is very clear on that point. *Dubois* v. *Packard Bell Corp.,* 470 F. 2d 973, 975 (10th Cir. 1972); *Crosslin* v. *Mountain States Telephone & Telegraph Co.,* 422 F. 2d 1028, 1030-31 (9th Cir. 1970), *vacated and remanded,* 400 U. S. 1004 (1971); *EEOC* v. *Union Bank,* 408 F. 2d 867, 869-70 (9th Cir. 1968); *Stebbins* v. *Nationwide Mutual Insurance Co.,* 382 F. 2d 267, 268 (4th Cir. 1967), *cert. den.,* 390 U. S. 910 (1968); *Ethridge* v. *Rhodes,* 268 F. Supp. 83, 89 (S.D. Ohio 1967). There is no similar legislative history accompanying § 633(b), so the rationale behind the prevailing interpretation of § 2000e-5(c) simply does not apply to § 633(b). . . .

Gabriele v. Chrysler Corp., 573 F. 2d 949, 953 (6th Cir. 1978).

ments derived from the statute itself, as well as other persuasive arguments, support the conclusion that we reach today.

First, the ADEA contains in addition to 633(b) the highly relevant subsection 633(a).[30] That provision provides that a federal action filed over sixty days after commencement of the state action *must supersede* the pending state proceeding.[31] It would indeed be incongruous to attribute an intent to Congress to mandate resort to state proceedings when those proceedings need not be concluded, and would in any event be necessarily superseded by the filing of a federal suit. In short, "the ADEA reflects less deference to state mechanisms than does Title VII." *Reich* v. *Dow Badishe Co.*, No. 76-7637, slip op. at 6684 (2d Cir. Apr. 4, 1978) (Feinberg, J., dissenting); *accord, Gabriele* v. *Chrysler Corp.*, 573 F. 2d 949, 954 (6th Cir. 1978).

Second, even if Title VII procedures were relevant to the interpretation of the ADEA, which *Lorillard* holds they are not, the particular language of the ADEA relevant here (section 633(b)) is not the same as that found in Title VII. As Judge Celebrezze has explained:

> [An] important distinction exists between § 633(b) and § 2000e-5(c). The latter states that "no charge may be filed" until after the sixty-day waiting period. This prevents all federal action during the waiting period, since filing of a charge with the EEOC is a prerequisite to a Title VII suit in federal court. The

[30]Title VII contains no such provision. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1212 (1971).

[31]29 U.S.C. § 633(a) reads in full:

> Federal action superseding State action
>
> (a) Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

> sixty-day period gives the appropriate state agency two months of exclusive jurisdiction over the discrimination allegation. Section 633(b), on the other hand, says "no suit may be brought" until after the sixty-day waiting period. This only prohibits the filing of a complaint in the district court and contemplates possible concurrent administrative action by the state agency and the Department of Labor. *Bonham* v. *Dresser Industries, Inc.*, 569 F. 2d 187, 194, n. 8 (3d Cir. 1977) [*petition for cert. filed*, 46 U.S.L.W. 3695 (U.S. May 1, 1978) (No. 77-1562)]. The absence of a period of exclusive state jurisdiction under the ADEA is thus another indicia of lesser deference to the states under the ADEA than under Title VII. Again, this militates in favor of not requiring prior resort to a state agency before an ADEA suit in federal court.

Gabriele v. *Chrysler Corp.*, 573 F. 2d at 954.[32]

Third, section 633 is entitled "Federal-State Relationship," not "Jurisdiction," nor "Procedural Prerequisites." These latter subjects are dealt with in an entirely different section of the statute, *see* n. 6 *supra*, thereby indicating that congressional concern as expressed in section 633 was restricted to notions of comity and federalism, not to jurisdictional prerequisites.

Additionally, we find it significant that the Secretary has urged that the ADEA affords complainants a choice of forum. "[S]uch a reasonable construction of an ambiguous statute by the agency charged with its administration is entitled to great deference." *Reich* v. *Dow Badiche Co.*, No. 76-7637, slip op. at 6683-84 (Feinberg, J., dissenting), *citing Udall* v. *Tallman*, 380 U. S. 1, 16 (1965); *accord, Goger*, 492 F. 2d at 18 (concurring opinion). *See also Vermont Yankee Nuclear Power Corp.* v. *National Re-*

[32]*Accord*, Note, *Procedural Prerequisites*, 44 U. Chi. L. Rev. at 478-79.

sources Defense Council, Inc., 46 U.S.L.W. 4301, 4308 (U.S. Apr. 3, 1978).

Indeed, Congress itself has recently expressed its views as they bear upon the issue before us.[33] The 1978 Congress, amending other provisions of the ADEA, left the entire section 633 intact, and did not effect any relevant changes in § 626.[34] Nevertheless the joint conference report which accompanied the amendments adopted the Senate Report which dealt with the very issue with which we are here concerned. The relevant section of the Senate Report adopted in the joint conference report reads as follows:

> Section 14(b) of the Act [29 U.S.C. § 633(b)] provides that where an act of discrimination occurs in a State which has an age discrimination law and an agency empowered to grant or seek relief from such discriminatory practices, no suit may be brought under section 7 of this Act [29 U.S.C. § 626] before the expiration of sixty days after proceedings have been commenced under State law, unless such proceedings have been earlier terminated. This provision requires that if the individual chooses to apply first to the State agency for relief he must give the State the prescribed minimum period in which to take remedial action before he may turn to the federal courts for relief under the ADEA. *The provision does not require that the individual go to the State first in every instance.*
>
> *Several courts have properly recognized this distinction.* See e.g., *Smith* v. *Jos. Schlitz Brewing Company*, 419 F. Supp. 770, 774 (D.N.J. 1976) [appeal

[33]Our examination of the legislative history which underlies the 1967 enactment of § 633(b) reveals no support for the proposition that initial resort to state remedies is required. The absence of clear legislative history in this connection has also been recognized by the Sixth Circuit in Gabriele v. Chrysler Corp., 573 F. 2d at 953.

[34]*See* n. 6 *supra*.

> *pending*, No. 77-1745 (3d Cir., filed Mar. 28, 1977)]; *Vazquez* v. *Eastern Air Lines*, 405 F. Supp. 1353, 1356 (D.P.R. 1975); *Bertrand* v. *Orkin Exterminating Company*, 419 F. Supp. 1123, 1126 (N.D. Ill. 1976) [*reaffirmed*, 432 F. Supp. 952 (N.D. Ill. 1977)]; *Goger* v. *H. K. Porter Company*, 492 F. [2d] 13, 17-18 (C.A. 3, 1974) (Garth, J., concurring).
>
> Other courts, however, have ruled that the complainant must go initially to the State authorities in every instance, and that the failure to do so requires dismissal of the federal action. *See Vaughn* v. *Chrysler Corp.*, [382] F. Supp. 143 (E.D. Michigan 1974); *Smith* v. *Crest Communities, Inc.*, 8 FEP Cases 1328 (W.D. Ky. 1974); *Fitzgerald* v. *New England Tel. & Tel. Co.*, 416 F. Supp. 617 (D. Mass. 1976) [*vacated mem.*, 437 F. Supp. 635 (D. Mass. 1977)]; *see also Goger* v. *H. K. Porter Co.*, 492 F. 2d 13 (C.A. 3, 1974).
>
> *It is the committee's view that an individual who has been discriminated against because of age is free to proceed either under state law or under federal law. The choice is up to the individual.* However, as Section 14(b) makes clear, if the individual does choose to proceed initially under State law, he must give the State agency at least 60 days to take remedial action before he may commence a federal action.

S. Rep. No. 493, 95th Cong., 1st Sess. 6-7 (emphasis added), *reprinted in* [1978] U. S. Code Cong. & Ad. News 976, 981-82, *adopted in* "Joint Explanatory Statement of the Committee of Conference," H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 7, 12, *reprinted in* [1978] U. S. Code Cong. & Ad. News 1000, 1006.

It is a rare and welcome event to discover legislative history so unambiguous. Slightly more problematic however is the impact of a 1978 joint committee report on our interpretation of a 1967 enactment. Certainly the intent of

the 1978 amenders of the ADEA cannot be said to represent or reflect the intent of the 1967 Congress: there is no necessary relation back.[35] Yet an interpretation of the ADEA which was feasible, if not preferable, before 1978 has now been officially ratified by the joint congressional committee assigned to study and recommend changes in the statute. We recognize, as did the Supreme Court, that although the views of a subsequent Congress "provide no controlling basis" for inferring original congressional intent, "[n]onetheless, it is pertinent to note [the views of a subsequent congressional committee] . . . reporting . . . on certain proposed amendments to the Act." *Haynes* v. *United States*, 390 U. S. 85, 87-88 n.4 (1968). In *Haynes* the Supreme Court was referring to the House Ways and Means Committee which reported on amendments to the National Firearms Act. *A fortiori* the views of a joint congressional committee are entitled to consideration and weight in our re-examination of the contours of sections 626(d) and 633(b) of the ADEA.

Finally, it is appropriate to consider whether a state resort requirement read into 29 U.S.C. § 633(b) would effectuate or frustrate the purposes of the ADEA. In this regard, we are cognizant of those arguments advanced by the proponents of prior state resort. We appreciate for example the fact that by allowing state agencies to process age discrimination complaints in the first instance, relief may be given to congested federal court calendars. We also acknowledge that a sixty-day wait to which claimants would

[35]Haynes v. United States, 390 U. S. 85, 87 n. 4 (1968) ("[t]he views of a subsequent Congress of course provide no controlling basis from which to infer the purpose of an earlier Congress"); United States v. Price, 361 U. S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"); *see* United States v. Southwestern Cable Co., 392 U. S. 157, 170 (1968); Rainwater v. United States, 356 U. S. 590, 593 (1958).

be subjected under section 633(b) is rather minimal in light the expected length of the overall proceedings.

Even recognizing these arguments as well as the other advantages which may be attributed to a prior resort procedure, we are nevertheless mindful that the ADEA is remedial legislation and is entitled to be liberally construed. *Gabriele* v. *Chrysler Corp.*, 573 F. 2d at 954; *Skoglund* v. *Singer Co.*, 403 F. Supp. 797, 801 (D. N.H. 1975); *see Goger* v. *H. K. Porter Co., Inc.*, 492 F. 2d at 17. As such in the absence of congressional expression, we should be chary about creating unnecessary procedural bars which may, at the outset, require the dismissal of otherwise meritorious age discrimination claims. Moreover, it seems anomalous to us that deference must be accorded to state agency procedures when it is a *federal* right that is sought to be vindicated. Indeed, it should not be overlooked that whatever might be said in favor of requiring the initiation of procedures before a state agency, section 633(a) by its terms has always permitted total disruption of state proceedings (once sixty days have passed) by requiring that a federal suit supersede any state action.

On balance therefore we do not hesitate to conclude that the ADEA's purposes would be frustrated rather than fulfilled if we were to perpetuate a procedural requirement which in many instances would prevent an otherwise meritorious age discrimination claim from being considered.[36]

[36]In this circuit alone, we have had three examples of claimants who had not fulfilled what we characterized in Rogers v. Exxon Research & Engineering Co., 530 F. 2d 834, 844 (3d Cir. 1977), *cert. denied*, 98 S. Ct. 749 (1978), as the "jurisdictional" requirement of resorting to prior state proceedings. In each instance however we recognized an equitable "outlet" which avoided the harsh result of dismissing the complaint because of this procedural bar. Bonham v. Dresser Indus., Inc., 569 F. 2d 187 (3d Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3695 (U.S. May 1, 1978) (No. 77-1562); Rogers v. Exxon Research & Engineering Co., 530 F. 2d at 844; Goger v. H. K. Porter Co., Inc., 492 F. 2d 13 (3d Cir.

(Footnote continued on following page)

IV

While it may be unusual for us to reject a court precedent announced by us but four years ago, when it becomes apparent that jurisprudential integrity demands no less, we will not shrink from undertaking that assignment. To expand upon the observation expressed by Judge Gibbons in *Cox* v. *Dravo Corp.*,[37] "[w]e should not countenance the continued application in this circuit of a rule, even of our own devising, which is patently inconsistent with the Supreme Court's pronouncements," and which does not take into account valid public policy concerns, congressional predilection, and our own unease with a judicial impediment to remedial legislation. These considerations result in our now construing section 633(b) differently from the construction to which we subscribed four years ago in *Goger*. Accordingly, we now hold, contrary to our holding in *Goger*, that no prior resort to state agency procedures is required as a precondition to commencing a federal action charging age discrimination under the ADEA.[38]

The order of the district court will be reversed, and the case remanded for proceedings not inconsistent with this opinion.

To THE CLERK:

Please file the foregoing opinion

(s) (Not legible)
Circuit Judge

(Footnote continued from preceding page)

1974). Our overturning of *Goger's* state resort doctrine will now permit a more straightforward approach to fulfilling the remedial purposes of the ADEA—without our having to fashion equitable "savings" devices.

[37] 517 F. 2d 620, 627 (3d Cir.), *cert. denied*, 423 U. S. 1020 (1975).

[38] Our holding today also decides the question left unanswered by our court in Marshall v. West Essex General Hosp., No. 77-1758 (3d Cir. Apr. 20, 1978): *a fortiori* the Secretary of Labor need not resort to state age discrimination remedies before prosecuting charges under the ADEA.

JAMES P. HOLLIDAY, *Appellant*, v. KETCHUM, MACLEOD & GROVE, INC., a corporation; EDWARD T. PARRACK; WILLIAM H. GENGE; CHARLES E. MCHUGH; and JAMES E. FULLER No. 77-1867

HUNTER, *Circuit Judge:*

We again are presented with the question whether section 14(b) of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 633(b), requires that a state administrative agency be given 60 days to attempt to remedy, usually by obtaining voluntary compliance, age discrimination in employment prior to an individual's resort to a federal court. The statute, as the court's opinion notes, does not by its plain text answer this question. In *Goger* v. *H. K. Porter Co.*, 429 F. 2d 13 (3d Cir. 1974), a majority of a panel of this court held that such prior resort was required. The majority looked to the legislative history of the ADEA and found only a repetition of the statutory language and no guidance. 429 F. 2d at 16. The language of section 14(b) was found to be substantially identical to the "state deference" requirement in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(c). That section at that time, as now, requires resort to state procedures before a federal remedy is invoked. *E.g. Love* v. *Pullman Co.*, 404 U. S. 522 (1972). *See Occidental Life Insurance Co.* v. *EEOC*, 432 U. S. 355, 357 (1977). While the majority recognized differences between Title VII and the ADEA procedures, it felt that the differences did not warrant departure, in the absence of congressional direction, from the analogy to Title VII plainly suggested by the similar language of the two statutes. *See Northcross* v. *Board of Education*, 412 U. S. 427 (1973), (per curiam); *United Shoe Workers of America* v. *Bedell*, 506 F. 2d 174 (D.C. Cir. 1974). Three courts of appeals have followed the reasoning of the majority opinion in *Goger*. *Evans* v. *Oscar Mayer & Co.*, No. 77-1692 (8th Cir. Apr. 5, 1978); *Reich* v.

Dow Badische Co., No. 76-7637 (2d Cir. April 4, 1978); *Curry* v. *Continental Airlines*, 513 F. 2d 691, 693 (9th Cir. 1975). *But see, e.g., Gabriele* v. *Chrysler Corp.*, 573 F. 2d 949 (6th Cir. 1978).

The court has now looked again at the intent of Congress to interpret section 14(b), in light of the 1978 amendments to the Act. Although Congress did not amend the language of section 14(b) which relates to the issue before us, the Reports of the Senate and Conference Committees contained *en passant* references to the Committees' view of the role of state procedures in the Act's remedial scheme. While recognizing that this after-the-fact "legislative history" is pertinent, although not entitled to great weight, *see, e.g., Haynes* v. *United States*, 390 U. S. 85, 87-88 n. 4 (1968), the court has now concluded that Congress in 1967 intended that the victim of age discrimination is not required first to seek a state remedy.[1] Prior resort to the state is to be left to the option of the employee.

The question of state deference in this context is purely a matter for the legislature. In the light of all the legislative material now before us, and in view of our experience with litigation under the Act, *see, e.g., Bonham* v. *Dresser Industries, Inc.*, 569 F. 2d 187 (3d Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3695 (U.S. May 1, 1978); *Rogers* v. *Exxon Research & Engineering Co.*, 550 F. 2d 834 (3d Cir. 1977), *cert. denied*, 98 S. Ct. 749 (1978), the court's present decision is, in my view, appropriate.

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[1]The Court's opinion also relies on the recent Supreme Court decision in Lorillard v. Pons, 46 U.S.L.W. 4150 (U.S. Feb. 22, 1978), as undercutting the reasoning in *Goger*. While I agree that the Supreme Court pointed out the weakness of the analogy between Title VII and the ADEA in some contexts, I do not believe that *Lorillard* compels a wholesale rejection of such reasoning. For example, this court recently found such an analogy quite helpful in Rodriguez v. Taylor, 569 F. 2d 1231 (3d Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3617 (U.S. Mar. 23, 1978). *Lorillard* stands only for the narrow point that the provisions of the two statutes which affect the right to a jury trial are sufficiently different that they should not be construed *pari passu* on that particular question.